No. 23-1094

IN THE

Supreme Court of the United States

AT&T SERVICES, INC., AND
AT&T BENEFIT PLAN INVESTMENT COMMITTEE,

Petitioners,

v.

ROBERT J. BUGIELSKI AND CHAD S. SIMECEK,
INDIVIDUALLY AS PARTICIPANTS IN THE AT&T
RETIREMENT SAVINGS PLAN AND AS REPRESENTATIVES
OF ALL PERSONS SIMILARLY SITUATED,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure statement in the petition remains accurate.

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REPLY BRIEF FOR PETITIONERS

There's an acknowledged 2-2-1 split over whether ERISA prohibits routine, arm's-length agreements for necessary plan services like recordkeeping. Two circuits (the Third and Seventh) say "no." Two others (the Eighth and Ninth) say "yes." One more (the Second) says "it depends." Resolving that clean, entrenched conflict is necessary because the circuits' disarray thwarts Congress's goal "of creating a uniform standard by which ERISA plans can be created and operated." ERISA Industry Committee et al. Amici Br. 14. And it creates a nightmare for plan administrators across the country trying to discern their obligations. *Id.* at 2.

Respondents concede that the circuits are split (at 11, 17), but insist (at 10) that the conflict pertains to "different questions under different portions of ERISA." That's wrong—the opinions speak for themselves, and respondents can't deny that the Ninth Circuit expressly "disagree[d]" with contrary decisions of the Third and the Seventh Circuits. Pet. App. 23a, 27a. Though respondents try (at 10-15) to write off those disagreements as irrelevant, the Ninth Circuit obviously thought otherwise or it wouldn't have drawn the line in the sand it did. Respondents' hair-splitting can't avoid the reality that the Ninth Circuit further entrenched the split by embracing the rule expressly rejected by the Third and Seventh Circuits and holding that routine, arm's-length agreements for necessary plan services are per-se prohibited.

Unable to shake the split, respondents resort to minimizing the importance of resolving it—but they don't dispute either ERISA's critical need for uniformity, or the serious practical implications for plan administrators (and, ultimately, for plan beneficiaries). Amici—whose members oversee trillions of assets in ERISA plans covering millions of participants—make no bones about the importance of this Court's review (at 2): "Left undisturbed, the Ninth Circuit's flawed interpretation of ERISA's prohibited transaction provision has the potential to impact the orderly and efficient operation of every retirement plan in the country."

Respondents are left to wheel out the standard vehicle objections—the case is interlocutory, either party could win on other grounds down the road, etc. But the same could be said about virtually all the (many) cases this Court grants in the same posture. There's no denying that the important, recurring question presented is teed up perfectly for this Court's review. The Court should grant the petition, resolve the split, and reverse the Ninth Circuit.

I. THE CIRCUIT SPLIT IS ACKNOWLEDGED AND ENTRENCHED.

The courts of appeals are deeply divided over whether routine, arm's-length transactions for plan services are prohibited transactions under Section 406(a)(1)(C). Pet. 11-17. Respondents concede the division (at 11, 17), but their attempts to deny that it's implicated here don't withstand scrutiny.

A. The Third and Seventh Circuits have rejected any "per se rule that every furnishing of goods or services between a plan and party in interest is a prohibited transaction" under Section 406(a)(1). *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 336 (3d Cir. 2019); see *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 584-85 (7th Cir.

2022). In those circuits, routine, arm's-length agreements for plan services don't constitute prohibited transactions under Section 406(a)(1)(C). *Sweda*, 923 F.3d at 336; *Oshkosh*, 47 F.4th at 584-85; see Pet. 12-13.

Respondents insist the Third Circuit didn't address routine service transactions made at arm's length and instead held only that Section 406(a)(1) requires an "intent to benefit a party in interest." Br. in Opp. 10 (quoting *Sweda*, 923 F.3d at 338). But an agreement made with that intent isn't a routine, arm's-length transaction. Take respondents' own example (at 11). A transaction in which a fiduciary "channels business to his best friend * * * intending to pad the friend's pockets" is neither routine nor made at arm's length. And whatever respondents might claim, that sort of transaction—like any non-routine, non-arm's-length transaction—"present[s] a special risk of plan underfunding," making it squarely prohibited by Section 406(a)(1)(C). *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 893 (1996).

Respondents try (at 13-15) to pull the Seventh Circuit out of the split by arguing that its decision supposedly involved an "initial agreemen[t]" between a plan and a service provider. But the Seventh Circuit cast its holding more broadly, rejecting the argument that "routine payments by plan fiduciaries to third parties in exchange for plan services are prohibited." *Oshkosh*, 47 F.4th at 585. Respondents try to dismiss that conclusion (at 14-15) as "idle speculation," but district courts in the Seventh Circuit have treated it as binding—and that's what counts. See *Baumeister* v. *Exelon Corp.*, 2023 WL 6388064, at *11 (N.D. Ill. Sept. 29, 2023).

B. The Eighth and the Ninth Circuits have reached the opposite conclusion, holding that plan fiduciaries engage in prohibited transactions under Section 406(a)(1)(C) by entering routine, arm's-length agreements for plan services. *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 601-02 (8th Cir. 2009); Pet. App. 12a; see Pet. 14-15.

Respondents contend (at 16-17) that the Eighth Circuit is outside the split because its decision "dealt only with the burden of pleading a Section 408 exemption." But the Section 408 issue arose only because the Eighth Circuit held that a plaintiff can state a claim under Section 406(a)(1)(C) based on *any* "furnishing of services * * * between the plan and a party in interest"—including agreements that are routine and arm's length. *Braden*, 588 F.3d at 601-02 (quoting 29 U.S.C. § 1106(a)(1)(C)). The same allegations would be dead on arrival in the Third and Seventh Circuits. See *Sweda*, 923 F.3d at 336; *Oshkosh*, 47 F.4th at 584-85.

While respondents concede (at 11-13) that the Ninth Circuit explicitly disagreed with the Third and Seventh Circuits, they contend that disagreement involved different issues not implicated here. But there's no denying that the Ninth Circuit embraced the per se rule expressly rejected by the Third and Seventh Circuits when it held that routine, arm's-length agreements for plan services are "prohibited transaction[s] under § 406(a)(1)(C)." Pet. App. 12a.

C. The Second Circuit has staked out its own approach, holding that the statutory exemptions in Section 408 are incorporated into Section 406, so that some—but not all—routine, arm's-length agreements are prohibited transactions. *Cunningham* v. *Cornell Univ.*, 86 F.4th 961, 973-75 (2d Cir. 2023), *petition for cert. filed*, No. 23-1007 (Mar. 11, 2024); Pet. 15-17.

Respondents' insistence (at 15-16) that the Second Circuit didn't break from the Ninth Circuit is hard to fathom. The Second Circuit concluded that Section 406(a)(1)(C) "cannot be read" in the way the Third and Seventh Circuits read it, but also rejected the "more expansive reading" endorsed by the Eighth and Ninth Circuits. *Cunningham*, 86 F.4th at 973-75. So it interpreted Section 406(a)(1)(C) in a third way—as "incorporat[ing]" the Section 408(b)(2)(A) exemption. *Id.* at 975.

The bottom line is that—contrary to respondents' assertion (at 10)—the same facts here would lead to different outcomes in circuits across the country. AT&T's amendment to its service agreement with Fidelity was routine and made at arm's length with no evidence of an intent to benefit Fidelity. Pet. 24. In the Third and Seventh Circuits, those facts wouldn't state a claim—much less survive summary judgment—under Section 406(a)(1)(C). See *Sweda*, 923 F.3d at 336; *Oshkosh*, 47 F.4th at 584-85. But in the Eighth and Ninth Circuits, they would at minimum state a claim and—if sufficiently supported by facts making the Section 408(b)(2)(A) exemption inapplicable—escape summary judgment to boot. See *Braden*, 588 F.3d at 601-02; Pet. App. 28a-30a. And in the Second Circuit, respondents would have the burden under Section 406(a)(1)(C) to produce evidence at summary judgment that the Section 408(b)(2)(A) exemption applies, which they didn't do here. See

Cunningham, 86 F.4th at 978.[1] Splits rarely come so clean.

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THIS IMPORTANT AND RECURRING ISSUE.

Resolving the conflict among the courts of appeals over the scope of Section 406(a)(1)(C) is particularly important given the imperative of nationwide uniformity in ERISA's interpretation—not to mention the destabilizing consequences of the Ninth Circuit's rule. See ERISA Industry Committee et al. Amici Br. 22 (explaining that the decision below threatens to "crippl[e] plan sponsors' and plan fiduciaries' ability to operate plans in an orderly and efficient manner"). And this case presents an excellent vehicle for addressing that conflict because the Ninth Circuit unequivocally held as a matter of law that even routine, arm's-length transactions constitute "prohibited transactions" under Section 406. Pet. 29.

A. Respondents' attempts (at 20-23) to downplay the importance of the Ninth Circuit's decision fall flat.

Respondents don't dispute the critical importance of national uniformity in the interpretation of ERISA or that the circuits' current division frustrates that goal. And they don't dispute that ERISA's liberal venue provision aggravates the uncertainty by leaving plan sponsors without any way to reliably discern *which* rule they'll face. Pet. 28. It's undeniable that plans can't offer their participants the highest-caliber service when "conflicting directives" bog down their

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[1] The district court has already held that respondents' purported "evidence" (at 17) of unreasonable compensation is "unsupported." Pet. App. 59a.

administration. *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (citation omitted).

Respondents try to sidestep these concerns by asserting (at 21) that the Ninth Circuit's rule has been the same for 40 years. But the Ninth Circuit didn't think so. It spent 18 pages of its slip opinion addressing the question presented as a matter of first impression, including discussing and disagreeing with decisions of the Third and Seventh Circuits—all of which would've been unnecessary had the issue been controlled by decades-old circuit precedent. It's no surprise, then, that before the decision below, district courts in the Ninth Circuit had endorsed AT&T's reading of Section 406. See, *e.g.*, *Black* v. *Greater Bay Bancorp Exec. Supplemental Comp. Benefits Plan*, 2017 WL 8948732, at *9 (N.D. Cal. Jan. 18, 2017); *Prudential Ins. Co. of Am.* v. *Brimberry*, 2014 WL 12687635, at *1, *9 (C.D. Cal. Apr. 24, 2014).

For the same reason, respondents' statistical analysis (at 21-22) is meaningless. Because the decision below announced a new approach to Section 406(a)(1)(C) in the Ninth Circuit, the purported absence of a "race to the Ninth Circuit" *before then* proves nothing. Br. in Opp. 21.

Commentators have widely recognized that the Ninth Circuit's ruling wrought a sea change in ERISA law, "expand[ing] the universe of arrangements that qualify as prohibited transactions," Theresa S. Gee et al., *Expert Insights—The ERISA Edit: A Disturbance in the Force*, Emp. Benefits Mgmt. 6273597 (C.C.H.), 2023 WL 6273597 (Sept. 27, 2023), and "pour[ing] gasoline on the fire of speculative ERISA class actions," Ada W. Dolph & Thomas Horan, *A Legal Opinion of ERISA Threatens to Ignite Class Action Challenges to*

Retirement Plan Fees, Emp. Benefits News (Sept. 25, 2023), bit.ly/3YTfxqF.

Indeed, ERISA plaintiffs are already marshaling the decision below to target routine transactions for plan services and avoid motions to dismiss. See, *e.g.*, *Nagy* v. *CEP Am., LLC*, 2024 WL 2808648, at *1, *6-7 (N.D. Cal. May 30, 2024); *Chea* v. *Lite Star ESOP Comm.*, 2024 WL 280771, at *1, *35 (E.D. Cal. Jan. 25, 2024) (report & recommendation).

Respondents' assurance (at 22) that Section 408's exemptions can undo this damage whistles past the graveyard. For one, Section 408 doesn't protect *all* reasonable and necessary transactions. In fact, respondents don't dispute that there are swathes of reasonable and necessary transactions prohibited under their reading of Section 406(a)(1)(C) yet not exempted under Section 408. Pet. 19-20.

And for another, as respondents state (at 18 n.3), some circuits have held that defendants have the burden to plead and prove those exemptions' application. See, *e.g.*, *Braden*, 588 F.3d at 601. Plaintiffs in those circuits can state Section 406 claims based on *any* routine, arm's-length "transaction"—even if that transaction later qualifies for a Section 408 exemption. Such protracted litigation is unappetizing for any defendant, but particularly for plan sponsors staring down class actions, which have cost more than $1 billion in settlements between 2015 and 2020 alone. ERISA Industry Committee et al. Amici Br. 18. The only sure way to avoid the Scylla of that untoward result is to set sail for the Charybdis of another and forgo transactions for necessary plan services altogether.

Respondents' promise (at 22) that the Department of Labor can play Mr. Fix-It by creating new exemptions down the road is illusory at best. Even if the

Department cooperated, defendants would still need to plead and prove the applicability of such an exemption in many circuits—meaning they would still have no quick way to end even the least meritorious Section 406 claims.

B. None of respondents' makeweight vehicle objections (at 19-20) would impede this Court's review.

Respondents contend (at 19) that this case is a poor vehicle to decide the meaning of *Section 406* because AT&T may win on remand under *Section 408*. But respondents can't dispute that the meaning of Section 406 itself was fully litigated and resolved below as a matter of law. This Court often reviews interlocutory decisions presenting an "important and clear-cut issue of law" like this one that "would otherwise qualify as a basis for certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (11th ed. 2019).

Indeed, this Court frequently grants review over respondents' objection that the decision below is interlocutory. See, *e.g.*, Br. in Opp. at 23-26, *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 144 S. Ct. 479 (2023) (No. 22-1165); Br. in Opp. at 9-11, *Smith* v. *United States*, 143 S. Ct. 541 (2022) (No. 21-1576); Br. in Opp. at 22-24, *Egbert* v. *Boule*, 142 S. Ct. 457 (2021) (No. 21-147); Br. in Opp. at 24-25, *Ruan* v. *United States*, 142 S. Ct. 457 (2021) (No. 20-1410). The same outcome should obtain here.

Respondents assert (at 19-20) that review is unwarranted because *they* could supposedly win under their Section 404 claim. But respondents ignore the significant practical difference (absent this Court's review) between claims under Sections 404 and 406. While Section 404 places the burden on *plaintiffs* to plead and prove that the costs of service agreements were unreasonably high, some courts have held that *defendants* have the burden to plead and prove an exemption from Section 406. Pet. 21-22. The decision below gave respondents a far more favorable litigating position under Section 406 than they have under Section 404.

Finally, respondents contend (at 17) that even if this Court grants review in *Cunningham*, it should deny review here because they pleaded the inapplicability of Section 408 exemptions and supposedly "produced evidence" accordingly. Even if that were true, but see *supra* p. 6 n.1, it would provide no sound basis to deny review. The question underlying both cases is the best reading of Section 406(a)(1)(C)—whether, as AT&T maintains, that provision should be understood as prohibiting only "commercial bargains that present a special risk of plan underfunding," *Lockheed*, 517 U.S. at 893, or whether, as the Second Circuit has held, it should be read to incorporate the exemptions in Section 408. To ensure that this Court can consider all views about the proper interpretation of Section 406, this Court could grant both this petition and *Cunningham* and consolidate the arguments. Pet. 25 n.4.[2]

III. THE NINTH CIRCUIT'S DECISION IS WRONG.

Section 406(a)(1)(C) doesn't bar routine service transactions made at arm's length. Text, context, and structure make clear that Congress instead prohibited transactions that present a unique risk of harming a

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[2] The *Cunningham* petitioners acknowledge that the decision below deepened a circuit conflict but insist that their case is the "superior vehicle" based on the same insubstantial vehicle objections raised by respondents here. Reply at 4, 9, *Cunningham* v. *Cornell Univ.*, No. 23-1007 (U.S. Aug. 5, 2024). If you're taking this much flak from all sides, you must be over the target.

plan's finances. Pet. 18-22. This reading also follows directly from this Court's decision in *Lockheed*, which held that Section 406(a)(1) prohibits only "commercial bargains that present a special risk of plan underfunding." 517 U.S. at 893; see Pet. 22-24.

Respondents' primary response (at 23-25) is to wrap themselves in the Ninth Circuit's erroneous reading of the statute. But they have no answer to this Court's admonition to avoid "uncritical literalism" when interpreting statutes, including ERISA. *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995); see Pet. 17.

Respondents also assert (at 25-29) that Section 408 cures the incongruities that follow from the Ninth Circuit's reading of Section 406(a)(1)(C). But Section 408 is no panacea, given the gaps between the transactions prohibited under respondents' reading of Section 406(a)(1)(C) and the exemptions under Section 408. See *supra* p. 8. Respondents don't dispute that the Labor Department's effort to fill those gaps distorts Section 408's text. Pet. 20.

In addition, respondents contend (at 18 n.3) that defendants bear the burden of proving the Section 408(b)(2)(A) exemption, even where, as here, the plaintiff has failed to put forward sufficient evidence of unreasonable compensation, Pet. App. 70a. On that reading, Section 408 provides no straightforward path to stop meritless claims in the early stages of litigation.

Respondents also assert that any transaction between a plan and a "part[y] in interest" is, "by definition, 'presumably not at arm's length.'" Br. in Opp. 29-30 (quoting *Lockheed*, 517 U.S. at 893). But that doesn't follow given the breadth of the term "party in interest." Transactions between plans and service providers can be—and nearly always are—made at arm's length, even if the parties have previously contracted. See, *e.g.*, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 583 U.S. 387, 397 (2018) (defining an arm's-length transaction as "a transaction conducted *as though* the two parties were strangers") (emphasis added). *Lockheed* confirms that transactions covered by the literal terms of Section 406 aren't barred unless they "present a *special* risk of plan underfunding"—which routine, arm's-length transactions between the plan and a party in interest don't. 517 U.S. at 893, 895 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 27, 2024